STATE OF MICHIGAN

COURT OF APPEALS

EILEEN KERR, HENRY JACOBI, JR., and CARMON FOX,

Plaintiffs-Appellees,

v

LUTHER "DUKE" HATCHETT and ROY HATCHETT,

Defendants-Appellants.

UNPUBLISHED
September 20, 2005

No. 254248
Genesee Circuit Court
LC No. 02-074574-CZ

Before: Meter, P.J., and Murray and Schuette, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying sanctions. We reverse.

This is a campaign finance case brought by three Thetford Township trustees against the township supervisor and groundskeeper. On appeal, defendants argue that the trial court erred in denying sanctions under MCL 600.2591 and MCR 2.114(D). This Court reviews a trial court's decision on whether to award attorney fees under MCR 2.114 for clear error. *McDonald v Election Comm'n*, 255 Mich App 674, 697; 662 NW2d 804 (2003). Similarly, this Court will not disturb a trial court's finding on whether a claim or defense was frivolous under MCL 600.2591 unless the finding was clearly erroneous. *In re Costs and Attorney Fees*, 250 Mich App 89, 94-95; 645 NW2d 697 (2002). "A decision is clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made." *Id*. at 94 (internal quotation marks and citation omitted).

The Revised Judicature Act provides that "if a court finds that a civil action . . . was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred . . . in connection with the civil action . . . ." MCL 600.2591(1). "To determine whether sanctions are appropriate under MCL 600.2591, it is necessary to evaluate the claims or defenses at issue at the time they were made." *In re Costs and Attorney Fees*, *supra* at 94. The court must examine "the particular facts and circumstances of the claim involved." *Id*. at 94-95. The statute defines "frivolous" to mean either "(i) [t]he party's primary purpose in initiating the action . . . was to harass, embarrass, or injure the prevailing party"; "(ii) [t]he party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true"; or "(iii) [t]he party's legal position was devoid of arguable legal merit." MCL 600.2591(3)(a).

MCR 2.114(D) provides:

> The signature of an attorney or party . . . constitutes a certification by the signer that
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> * * *
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> (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the document is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law; and
>
> (3) the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

The sanction for violation of MCR 2.114(D) is provided by MCR 2.114(E):

> If a document is signed in violation of this rule, the court . . . shall impose . . . an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. . . .

Plaintiffs alleged "the illegal expenditure of Township funds and illegal use of Township facilities and equipment in connection with the recall election" faced by plaintiffs in September of 2002. The legal basis for plaintiffs' allegation was the Michigan campaign finance act ("the act"), which provides that an individual acting for a public body shall not use or authorize the use of public funds or resources to make an election contribution, subject to certain exceptions. MCL 169.257(1). The act provides, in pertinent part:

> A public body or an individual acting for a public body shall not use or authorize the use of funds, personnel, office space, computer hardware or software, property, stationery, postage . . . or other public resources to make a contribution or expenditure . . . . This subsection does not apply to any of the following:
>
> (a) The expression of views by an elected or appointed public official who has policy making responsibilities.
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> (b) The production or dissemination of factual information concerning issues relevant to the function of the public body.
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> * * *
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> (d) The use of a public facility owned . . . by . . . a public body if any candidate or committee has an equal opportunity to use the public facility.
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> * * *
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> (f) An elected or appointed public official or an employee of a public body who, when not acting for a public body but is on his or her own personal

> time, is expressing his or her own personal views, is expending his or her own personal funds, or is providing his or her own personal volunteer services. [MCL 169.257(1).]

The act defines a "contribution" as "a payment, gift . . . expenditure . . . or donation of money or anything of ascertainable monetary value . . . to a person, made for the purpose of influencing the nomination or election of a candidate . . . ." MCL 169.204(1). "Election includes a recall vote." MCL 169.205(2). Plaintiffs alleged three specific instances of illegal use of township resources: (i) use of a township Nextel phone to coordinate the recall with a citizen organizing the effort; (ii) placing a pro-recall information booth on township property using a township tent; and (iii) mailing, at township expense, a letter to township residents supporting the recall.

Defendants note that the trial court stated two reasons for denying sanctions: (1) that much of the requested amount of attorney fees related to work "that came after this Court denied Plaintiffs' relief," and (2) that at "the hearing on the Temporary Restraining Order, Defendants agreed to continue the injunction until after the election." Defendants argue that both of the stated reasons are invalid reasons for denying sanctions. We agree.

The amount of the total sanctions requested is not a valid basis, under any cited authority, to deny the relief requested. MCR 2.114(E) provides that "an appropriate sanction" may be imposed, "which may include . . . the amount of the reasonable expenses incurred because of the filing of the [offending] document." Thus, if a violation occurs, the court must determine an appropriate sanction, which may be limited to the expenses incurred by reason of the offending document. If the trial court in this case found that the total requested fees would not be "an appropriate sanction," or that not all of the fees requested were incurred "because of" the offending document, the court would not award all fees requested. MCR 2.114(E). The trial court also stated that most of the fees requested were incurred after the court denied plaintiffs' relief. This is true, but irrelevant. Defendants argued that not only plaintiffs' complaint but also their motion for contempt violated MCR 2.114. Therefore, the trial court should have analyzed (1) whether the motion for contempt violated MCR 2.114, and (2) whether defendants' costs incurred at the evidentiary hearing on the motion for contempt were awardable sanctions.

The fact that defendants agreed, at the September 23, 2002, hearing, to extend the temporary restraining order until 8:00 p.m. of the following day, also has no relevance to the issue of sanctions. Such an agreement did not have any tendency to show that defendants committed the illegal acts alleged in the complaint. At the September 23, 2002, hearing, defendants categorically denied committing any of the wrongdoing alleged in the complaint.[1] They had no reason to refuse to extend a temporary restraining order (TRO) that restrained them from activity they denied doing. In addition, whether defendants agreed at the September 23, 2002, hearing to extend the TRO for one day had no relevance on the issue of whether plaintiffs' contempt motion, brought in November, 2002, was well grounded in fact, warranted by existing

[1] In addition to their denial, the township attorney, Otis Stout, made a limited appearance at the September 23, 2002, hearing, and informed the court that the township's inventory of assets did not show any tent owned by the township.

law, and brought for a proper purpose. MCR 2.114(D). Defendants' motions for sanctions were aimed at showing that the motion for contempt, and resulting evidentiary hearing, violated MCR 2.114, although defendants also argued that the original complaint violated MCR 2.114. Accordingly, the trial court's second stated reason for denying sanctions was also clearly erroneous.

Because the trial court's stated reasons for denying sanctions were clearly erroneous, we reverse the trial court's order denying sanctions and remand this case to the trial court for a determination if plaintiff's motion for contempt and complaint were in violation of MCR 2.114(D) or MCL 600.2951, and if so, the appropriate amount of sanctions. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Bill Schuette